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OPINION OF THE Hon'ble

The question raised for consideration is whether the payments made by the Company by way of bonus and royalty-cum-income-tax are usual working charges.

2. By "bonus" we generally mean a boon or gift over and above what is normally due as remuneration to the receiver: New English Dictionary. It may also include, as pointed by Lord Birkenhead in (1933) 39 Times Law Reported 294 at p.297,"payment made because legally due, but which the parties contemplated will not continue indefinitely". Thus bonus may, according to the circumstances of each case, be either an ex-gratia payment or euphemism for addition to wages. The meaning to be given in the context under consideration would not justify it being treated as part of the working charges. There is no legal liability to pay such bonus, and it presuppposes the existence of profits, and as such cannot be treated as an item of expenditure; because, it cannot be ascertained until profits themselves are ascertained. It is an appropriation of the profits and not a debit to the profit and loss account. The fact that such amount is claimed as an a deduction in the Income-tax Act does not any more make it an usual working charge; because, it is a deduction expressly authorised by section 10(2)(x) of the Indian Income-tax Act. A perusal of the balance-sheet of any Company making a payment of bonus out of profits will also show that it is not treated as an item of usual working charge.

3. The same observations will apply with much greater force to the payment of royalty-cum-income-tax. It appears that the payment was made to the Awadh State in lieu of income-tax, which is a charge on profits and not an item of expenditure.

The question naturally depends upon the interpretation of the agreement between the Company and the State; but if it is a payment by way of income-tax, it is not liable to deduction as a working charge. See Ashton Gas Co. v. Attorney General, 1906 A.C. p/19, where it was observed at p.12 "The income-tax is a charge upon the profits; the thing which is taxed is the profit that is made, and you must ascertain what is the profit that is made before you deduct the tax,- you have no right to deduct the income-tax before you ascertain what the profit is".

4. That being the legal position, as it appears from the record now available, proceedings by way of a prosecution under section 2E2A or even civil proceedings would appear inadvisable.

5. While making the present reference, the Registrar should have precisely stated all the material facts and should also have forwarded copies of all the relevant documents such as the managing agency agreement, agreement relating to payment of royalty-cum income-tax and the balance-sheet in which the relevant entries appear. It is also not quite clear whether the appointment of Messrs. S.P.Ogle & Co. is governed by section 87^C of the Indian Companies Act. This point may be verified, and the relevant documents may be consulted with a view to see whether they affect the opinion given above, and, if necessary, a further ~~fm~~ reference may be made to the R.L.A.

Sd/- P.U.LAD,
15/9.

Assistant Legal Affairs.

U.R. to F.D. No.10505, dated the 16th September 1949.

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No. 13976.
Office of the
Remembrancer of Legal Affairs,
Bombay Castle,(BombayNo.1), 3rd.December 194

From

P.N.Lad,I.C.S.,

Remembrancer of Legal Affairs,

Secretariat, Bombay.

To

The Collector of Ahmedabad.

Sir, Subject:- Income-tax arrears - Recovery of - from Kalyan Mills, Ahmedabad.

Sir,

With reference to your letter No.R.E.V.3482 dated 7th October 1949 I have the honour to enclose a copy of my opinion herewith.

Yours Faithfully,

Sd/- P.N.LAD,

Remembrancer of Legal Affairs.

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Office of the R.I.A.

Indian Income-tax Act. S.46(2).

The first certificate specifying the amount of arrears due from Messrs. Kalidas Motibhai Mehta & Sons was issued by the Income Tax Officer to the Collector of Ahmedabad on 14-1-1947 requiring the Collector to recover the tax from the assessee as arrears of land revenue. Two more certificates were issued subsequently and they they were for - warded to the Collector of Ahmedabai on 9/11/1948 and 22/7/1949. All these certificates were issued under section 46(2) of the Indian Income-Tax Act for the recovery of the tax from the assessee as arrears of land revenue. None of these certificates was issued by the Income Tax Officer under sectio 46(3-A) requiring the Kalyan Mills to ~~xxxxx~~ pay the amount. Se 46(2) provides that an Income Tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee and the Collector on receipt of such certificate shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue. This provision empowers the Collector to recover the tax from the assessee as arrear of land revenue . ~~xxxxx~~ A proviso to that subsection (2) provides that without prejudice to any other powers of the Collector in this behalf he shall for th purpose of recovering the said amount have the powers which under the Code of Civil Procedure 1908 a Civil Court has for the purpose of recovery of amount due in a decre Under this proviso the Collector has got powers of a Civil Court for the purpose of recovering the income tax. The relevant provision /under which the Civil/ Court has powers in such a case is Rule 46, Order 21

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.. of the Civil Procedure Code whereunder a debt due to an assessee can be attached and sold for the purpose of recovering the tax. In Toolsa Goolale versus John Antone (11 Bom.44) it was held that where the garnishee admits the debt to some amount or does not deny the debt in toto the court will be justified in order ordering the judgment debtor to pay the amount but if however the garnishee denies the debt there is no other course open to the judgment-creditor than to have that debt sold or to have receiver appointed for the purpose. It is true that the Kalyan Mills did admit more than once the debt due to Messrs. Kalidas Motibhai Mehta & Sons and acknowledge their liability to pay the same to Government in satisfaction of the tax assessed and recoverable from Messrs. Kalidas Motibhai Mehta & Sons. However, the Mills have later on denied the debt and have protested against the attachment of their property for the recovery of the same. In view of their denial it would not be open to the Collector to attach the property of the Mills in satisfaction of the tax. All that the Collector could do was to attach the debt due, if any, from the Mills to Kalidas Motibhai Mehta & Sons or to sue the Mills on the basis of their admission to pay the tax. The attachment levied by the Collector on the property of the Mills is therefore illegal.

Sd/- P.M.Lad,
Remembrancer of Legal Affairs.

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7/6.

Office of the R.L.A.

Indian Income Tax Act, 1922. Section 46(2).

Bombay Land Revenue Code, 1879. Section 155.

Transfer of Property Act, 1882. Section 53.

Revenue Recovery Act, 1890. Section 6(1).

It appears that one Mr. Mohamad Yasin Kadri of Secunderabad was in arrears of income tax dues amounting to Rs.8,35,269-7-0. The Income Tax Officer, Special Central Circle, Madras, forwarded to the Collector, Sholapur, with his letter No.C-1-440/45-46, dated 29th September 1947, two certificates under section 46(2) of the Income Tax Act for the recovery of arrears of income tax dues amounting to Rs. 1,95,726 - 12 - 0 and excess profits tax of Rs.6,39,542-11-0 in all Rs.8,35,269-7-0, from Mr. Mohamad Yasin Kadri, a military contractor, who owned immoveable properties within the jurisdiction of the Collector of Sholapur. The Collector forwarded the certificates to the Mamlatdar of North Sholapur for necessary action. The Mamlatdar for one reason or another did not take any action in the matter until 10th of March 1948, when he found that the defaulter had disposed of all his properties between 18th July 1947 and 27th February 1948 for an amount of Rs.1,40,000. The Collector then made enquiries into the matter and came to the conclusion that the defaulter disposed of all his properties fraudulently and the considerations mentioned in the documents were bogus and the wanton mala
mere/fide transferees who had acted in collusion with the defaulter in order to defeat the claim of Government. He further held that the real title to the properties had continued to vest in the defaulter himself and ordered that the proceedings should be started for the recovery of the dues by sale of the defaulter's right, title and interests in these properties. These vendees appealed to the Commissioner who consulted the D.G.P., Poona. The D.G.P. opined :

"It is only when the Collector proceeds under section 155 of the Land Revenue Code that the

> .....subsequent transactions are affected. Therefore, the transactions entered upto between the date of the issue of the certificate under the Income Tax Act Section 46 and the taking recourse to section 155 of the Land Revenue Code will not be ipso facto void."

Accepting this opinion of the Government Pleader, the Commissioner appears to have come to the conclusion that, although the defaulter, as observed by the Collector of Sholapur, fraudulently disposed of the properties with intent to defeat Government's claim for the income tax, there was nothing to prove that the vendees had acted in collusion with the defaulter and consequently the Collector's order should be set aside. He has, therefore, moved Government to consult the R.L.A. whether the properties in question could be sold under section 155 of the Land Revenue Code for the realisation of the dues. Before making this reference to Government, he asked the Collector of Sholapur to justify his order on the facts of the case. The Collector of Sholapur, after consulting the D.C.P., Sholapur, stated in his letter that if at this stage a decision is taken that these properties are not liable to be sold for realisation of the Government dues on the ground that they are not fraudulent transfers, then it would be difficult for Government to recover the dues in question from the defaulter Mr. Mohamed Yasin Kadri. The R.L.A. is requested to advise whether the sale of the properties under section 155 of the Land Revenue Code should be proceeded with ignoring the transfer x made by the defaulter to the vendees.

Under section 46(2) of the Indian Income Tax Act,1922, on receipt of the certificate specifying the amount due from the assessees, the Collector shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue. Under section 6(1) of the Revenue Recovery Act, 1890, when the Collector receives a certificate regarding the dues to be recoverable as arrears of land revenue, the Collector may issue a proclamation prohibiting the transfer or charging of any immoveable property belonging to the defaulter in the district and

....under sub-section (3) any private alienation of the property or of any interest of the defaulter therein, whether, by sale, gift, mortgage or otherwise, made after the issue of the proclamation and before the withdrawal thereof, shall be void as against the Crown. As no proclamation was issued in the present case prohibiting the transfer or charging of any immoveable property of the defaulter under section 6(1), the question of the sale transactions being void does not arise. But this would not preclude the operation of section 53 of the Transfer of Property Act, whereunder fraudulent transfers of property of a debtor with intent to defeat or delay the ~~xxxxxxxxx~~ creditors shall be voidable at the option of any creditor so defeated or delayed. Under this provision it is not necessary that the transfer of property should have been made after proceedings have been taken under section 155 of the Land Revenue Code for realising Government dues. Consequently these sales though not void ab initio are voidable provided they are fraudulent with intent to defeat Government's claim.

The next question for consideration is whether the Collector should be asked to proceed with the attachment and sale of the properties of the defaulter ignoring the sales thereof. Under section 53(1) of the Transfer of Property Act, the term "creditor" is correlated to debtor and signifies a person to whom a debt, i.e., a liquidated or specified sum of money is due. The two certificates issued by the Income Tax Officer, Special Control Circle, Madras, are dated 29th September 1947. It is only on the issue of these certificate that the dues recoverable from Mr. Mohamad Yasin Kadri became a liquidated or specified sum of money. The property bearing ciry survey No.4862 was purchased by Mr.Dhanpat on 15th December 1947 from one Limbaji Nagu Kanakdhar of Sholapur for Rs.40,000, who purchased it from the defaulter on 16th July 1947. i.e. before the date of the

...certificates. This transaction it appears difficult to be impugned firstly because on the date on which Limbaji purchased the property from the defaulter the certificates not being issued, Government could not be considered a creditor and consequently the question of defeating the claim of Government would not arise; and secondly because Mr. Dhupad is an innocent purchaser and hence a transferee in good faith, to whom section 53 of the Transfer of Property Act does not apply even though Limbaji was a party to a fraud on creditors (see Mulla's Transfer of Property Act, p.272). The other vendees appear to stand on a different footing as they have purchased the properties of the defaulter after the certificates were issued to the Collector for recovering the arrears. The transfers referred to in section 53 of the Transfer of Property Act are transfers in fraud of creditors which are valid until they are voided and which are voidable at the option of any creditor defrauded, defeated or delayed. In Oakes v. Turquand and Harding (1867) L.R. 2 H.L. 325) the House of Lords said that voidable transactions may be avoided by any open or unequivocal declaration of an intention to avoid them. Accordingly in Ramaswami Chettiar v. Mallappa Reddiar (43 Madras 0) Wallis, C.J., said :

> "I am of opinion that it is open to the judgment-creditor by virtue of section 53 of the Transfer of Property Act to attach as the property of the judgment-debtor property which has been fraudulently transferred to the claimant with intent to defeat or delay creditors. If he knows of the transfer when he applies for attachment, the application is sufficient evidence of his intention to avoid it; if he only hear of the transfer when a claim petition is preferred under Order 21, rule 58, and still maintains his right to attach, that again is a sufficient exercise of his option to avoid."

It is clear from this provision that Government has got to decide whether they intend to avoid these transactions and if they so intend it is not necessary that Government should file suits to avoid these sales, and it would be sufficient if Government proceeds to attach the property and sell it under section 155 of the Land.....

Revenue Code, whereupon it would be open to the vendees to file suits for a declaration that the transactions are bona fide and not fraudulent. The suggestion made by the Collector of Sholapur is correct.

The next question for consideration is on whom would the burden of proof as to the fraudulent nature of the transaction lie. The onus of proving want of good faith in the transferee is on the creditor who impugns the transaction. But if fraud is established the onus of proving his good faith is shifted to the transferee (see Amarchand v. Gokul 5 Bom. L.R. 142). It would be evidence of a fraudulent intention if a debtor made a voluntary settlement, or a transfer for a grossly inadequate consideration without reserving sufficient property for the payment of his debts; so also if he puts all his property out of the reach of those who might become his creditors before embarking on a hazardous enterprise. But every such case would depend upon its own circumstances and in all cases it is a question of fact whether the transaction is bona fide or a contrivance to defraud creditors (see Chidambaram Chettiar, v. Sami Aiyar, 30 Madras 6). In the present case it is admitted that the defaulter has disposed of all his property. The Commissioner has accepted the conclusion of the Collector that the defaulter fraudulently disposed of his properties. If this conclusion is correct, the onus of proving the transfer being in good faith and for consideration would be on these vendees. It may be that these transfers are supported by good consideration, but that in itself would not be sufficient. What more is necessary is that the transaction should be proved to be bona fide and not fraudulent. Whether a transaction is fraudulent or bona fide must necessarily be proved by circumstancial

evidence. The fact remains that the certificates issued by the Income Tax Officer were lying with the Mamlatdar and an considerably big amount was to be recovered from the defaulter. Further, the defaulter it appears was owning valuable property and after the issue of these certificates he was making strenuous efforts to dispose of all this property. Any person who would like to invest his money in such purchases would enquire why the vendor, though apparently a man of means, was suddenly trying to dispose of all his properties. It should, therefore, be presumed that these vendees, who appear to be men of business, must have made proper enquiries. This circumstance would probably to sufficient to impute to them the knowledge of the fraudulent intention of the defaulter to dispose of his properties. In any event, it would be for these vendees to prove their bona fides. Consequently, the Collector may be asked to proceed with the attachment and sale of the properties of these vendees.

Sd/- P.M.Lad,
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Remembrancer of Legal Affairs.

U.R, to R.D., No.12154, dated the 31st October 1949.

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